

CUMULATIVE DIGEST

CH. 40

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§40-1

Generally

People v. Clendenny, 2016 IL App (4th) 150215 (No. 4-15-0215, 1/26/16)

1. Section 5-7-1 of the Unified Code of Corrections defines periodic imprisonment as “a sentence of imprisonment during which the defendant may be released for periods of time” to participate in a number of activities, including work. A sentence of periodic imprisonment shall be for a definite term of up to 18 months, or the longest sentence of imprisonment that could have been imposed, whichever is shorter. But a term of periodic imprisonment may not exceed one year if the defendant participates in a county work-release program. 730 ILCS 5/5-7-1.

2. The trial court sentenced defendant to 30 months’ probation, including 18 months of periodic imprisonment. The court agreed to allow defendant to be released for work, alcohol treatment, and to be present at the birth of his child. In describing the sentence, the court used the terms “periodic imprisonment” and “work release” interchangeably.

3. Defendant argued that the 18 months of periodic imprisonment was improper because the maximum term of work release is 12 months. The Appellate Court rejected this argument, holding that defendant’s periodic imprisonment with release for work, alcohol treatment, and the birth of his child, did not equally compare with participation in a county work-release program.

A work-release program is guided by specific parameters and subject to specific rules, sanctions, wages, and working conditions. By contrast, the conditions of defendant’s periodic imprisonment were more lenient and flexible, allowing defendant much greater independence than a work-release program. Although the trial court referred to the probation condition as “work release,” that did not establish that the court was actually imposing work release within the meaning of the statute.

Defendant’s sentence was affirmed.

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

2. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle

overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and resulted in defendant being sentenced as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found that deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

3. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

People v. Hillier, 392 Ill.App.3d 66, 910 N.E.2d 181 (3d Dist. 2009)

The trial court has authority to require a sex offender evaluation of a convicted defendant even where the conviction is for a non-probationable offense. Furthermore, a convicted defendant need not be warned that any statements made during such an evaluation may be used against him at sentencing. (See **CONFESSIONS**, §10-11).

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

People v. Horrell, 235 Ill.2d 235, 919 N.E.2d 952 (2009)

Where the defendant was sentenced to a term of probation on one count of a multi-count indictment, and the probation term was to commence during the mandatory supervised release period imposed as part of concurrent prison terms for several other counts, the probation term was a permissible concurrent sentence and not a consecutive sentence to the

prison term.¹ The court noted that a mandatory supervised release term is a required part of every prison sentence, and that a defendant who is serving a MSR term remains under sentence even after he is physically released from prison. Thus, a probation sentence to be served at the same time as an MSR term on another offense is clearly a concurrent sentence.

The court declined to consider what sentence could potentially be imposed if the trial court eventually decided to revoke probation, holding that such questions were not before the court in this appeal. (See also **APPEAL**, §2-6(a)).

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. McKinney, 2012 IL App (1st) 103364 (No. 1-10-3364, 8/8/12)

1. The Veterans Court Act (730 ILCS 167/1) establishes a veterans court and corresponding programs which allow a veteran who is charged with a crime to obtain dismissal of the charges, termination of his sentence, or discharge from further proceedings in exchange for completing a program which may include substance abuse, mental health, or other treatment. Admission to a veterans court program requires the agreement of the prosecutor and the defendant, as well as the approval of the veterans court. A defendant is ineligible for the veterans court program if he is charged with a crime of violence, is unwilling to participate in the program, has committed a crime of violence within the past ten years (excluding time of incarceration), or has previously completed or been discharged from such a program.

2. Under the plain language of the Veterans Court Act, a defendant is not required to be eligible for probation in order to participate in a veterans court program. The court found that the Veterans Court Act provides an independent basis for probation and conditional discharge which does not rely on the requirements of the Unified Code of Corrections. Thus, as a Class 2 offender who was being sentenced as a Class X offender due to prior convictions, defendant was eligible for the veterans court program although he would not have been eligible for probation had he been sentenced under the Unified Code of Corrections.

Because the defendant entered his guilty plea in the mistaken belief that he was ineligible for veterans court, the trial court abused its discretion by denying the motion to withdraw the plea. The trial court's ruling was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. Saleh, 2013 IL App (1st) 121195 (No. 1-12-1195, 8/14/13)

1. An order of supervision is not a final judgment of conviction. If a defendant successfully completes supervision, the charges are dismissed and the result resembles an acquittal. If supervision is not completed successfully, defendant may be found guilty and sentenced. There is a final judgment of conviction only upon revocation of supervision.

2. Supreme Court Rule 402A provides that in proceedings to revoke supervision in which the defendant admits to the violation or offers to stipulate that the evidence is sufficient to revoke supervision, the trial court must admonish defendant and determine that he understands: (1) the specific allegations in the petition to revoke supervision; (2) his right to a hearing with counsel present, including appointed counsel if he is indigent and the underlying offense is punishable by imprisonment; (3) the right to confront and cross-examine

¹Under 730 ILCS 5/5-6-2(f), a probation sentence to be served after the MSR term had been completed would be an impermissible consecutive sentence.

adverse witnesses and present witnesses and evidence on his behalf at the hearing; (4) the State must prove the alleged violation by a preponderance of the evidence; (5) on admitting a violation or stipulating that the evidence is sufficient to revoke, there will be no hearing, and defendant has waived his right to a hearing, to confront and cross-examine adverse witnesses, and to present witnesses and evidence on his behalf; (6) the sentencing range for the underlying offense. The court must also determine that the admission is voluntary, not based on any coercion or promise, and that there is a factual basis for the plea.

The court must substantially comply with Rule 402A by an affirmative showing in the record that the defendant understood each of the required admonitions. A court's compliance with the rule is reviewed *de novo*.

The court did not substantially comply with Rule 402A when it accepted defendant's stipulation that the evidence was sufficient to revoke his supervision. The court did not determine that defendant understood the allegations of the petition by its inquiry whether defendant had discussed the reasons for the violation with his attorney and understood the allegations. The court did not inform defendant of his right to a hearing at which he could confront adverse witnesses and present his own evidence, and at which the State had the burden of proof. He was not told that he was waiving these rights by stipulating. The court did not confirm that the stipulation was voluntary or that there was a factual basis. Although the court did inform defendant of the sentencing range for the offense when he was placed on supervision, that was almost two years prior to the revocation proceeding.

The court remanded with directions that the defendant be allowed to withdraw his stipulation and for further proceedings.

(Defendant was represented by Assistant Defender Philip Payne, Chicago.)

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Fourth Amendment and Exclusionary Rule

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§40-3

Denial of

§40- 3(a)

Generally

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

2. The trial court abused its discretion when it rejected probation and imposed a 42-

month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and resulted in defendant being sentenced as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found that deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

3. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

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Proper

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§40- 3(c)
Improper

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

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People v. Scarbrough, 2015 IL App (3d) 130426 (No. 3-13-0426, 5/13/15)

1. Under 730 ILCS 5/5-6-1(j), a defendant who has been charged with driving while his license is revoked (625 ILCS 6-303(a)) is ineligible for supervision if: (1) his license was revoked because of a violation of 625 ILCS 11-501 (driving under the influence); and (2) he has a prior conviction under section 6-303 within the last 10 years.

Defendant entered a blind guilty plea to driving on a revoked license. The trial court sentenced him to 12 months of conditional discharge with 30 days in jail, finding that he was ineligible for supervision. On appeal, defendant argued that he was eligible for supervision for two reasons: (1) his license had not been revoked because of a section 11-501 violation; and (2) his prior conviction under section 6-303 had not occurred within the last 10 years. The Appellate Court upheld defendant's sentence, rejecting both of his arguments.

2. Defendant's license had been revoked because of a bond forfeiture conviction based on an underlying DUI case. The Court held that for purposes of the Illinois Driver Licensing Law (625 ILCS 5/6-100 to 6-1013) bond forfeitures constitute convictions. Defendant's bond forfeiture in a DUI case was thus the equivalent of a conviction for DUI. Accordingly, his license had been revoked because of a violation of section 11-501.

3. The Court also rejected defendant's argument that the prior conviction must have occurred within 10 years of the time defendant pled guilty in the present case. Instead, the prior conviction must have occurred within 10 years of the time defendant was charged with the present offense. Here, defendant was charged with the current offense within 10 years from the date he was convicted of the previous 6-303 offense, and thus was not eligible for supervision.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa)

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§40-4
Conditions of

§40-4(a)
Generally

People v. Goossens, 2015 IL 118347 (No. 118347, 9/24/15)

Probation conditions may be either mandatory or discretionary. Discretionary conditions may be conditions that are specifically authorized by statute or conditions that are not explicitly authorized.

Thus, 730 ILCS 5/5-6-3(a) lists several mandatory conditions which are to be imposed for all probation sentences. Furthermore, 730 ILCS 5/5-6-3(b) provides that in addition to other reasonable conditions relating to the nature of the offense or the rehabilitation of the defendant, the trial court may impose any of several specified conditions, including that the defendant support his dependents. (730 ILCS 5/5-6-3(b)(6)).

The court concluded that where the trial court imposes a discretionary condition of probation that is specifically listed in 730 ILCS 5/5-6-3(b), there is no requirement that the condition relate to the offense for which probation is imposed. Thus, the trial court had discretion to require as a condition of probation that defendant become current in child support in another case, although that condition was not in any way related to intimidation, the offense for which the probation sentence was being imposed.

The court overruled **People v. Campbell**, 325 Ill.App.3d 569, 758 N.E.2d 504 (4th Dist. 2001), which held that all probation conditions, including those that are specifically listed in 730 ILCS 5/5-6-3(b), must relate to the nature of the offense.

(Defendant was represented by former Assistant Defender Rikin Shah, Elgin.)

People v. Clendenny, 2016 IL App (4th) 150215 (No. 4-15-0215, 1/26/16)

1. Section 5-7-1 of the Unified Code of Corrections defines periodic imprisonment as “a sentence of imprisonment during which the defendant may be released for periods of time” to participate in a number of activities, including work. A sentence of periodic imprisonment shall be for a definite term of up to 18 months, or the longest sentence of imprisonment that could have been imposed, whichever is shorter. But a term of periodic imprisonment may not exceed one year if the defendant participates in a county work-release program. 730 ILCS 5/5-7-1.

2. The trial court sentenced defendant to 30 months’ probation, including 18 months of periodic imprisonment. The court agreed to allow defendant to be released for work, alcohol treatment, and to be present at the birth of his child. In describing the sentence, the court used the terms “periodic imprisonment” and “work release” interchangeably.

3. Defendant argued that the 18 months of periodic imprisonment was improper because the maximum term of work release is 12 months. The Appellate Court rejected this argument, holding that defendant’s periodic imprisonment with release for work, alcohol treatment, and the birth of his child, did not equally compare with participation in a county work-release program.

A work-release program is guided by specific parameters and subject to specific rules, sanctions, wages, and working conditions. By contrast, the conditions of defendant’s periodic imprisonment were more lenient and flexible, allowing defendant much greater independence than a work-release program. Although the trial court referred to the probation condition as “work release,” that did not establish that the court was actually imposing work release within the meaning of the statute.

Defendant’s sentence was affirmed.

People v. Crabtree, 2015 IL App (5th) 130155 (No. 5-13-0155, 7/30/15)

1. A condition of probation is permissible if there is some connection between the condition and the underlying offense. In evaluating whether a probation condition is constitutional, courts consider whether: (1) the condition reasonably relates to the intended purpose of fostering rehabilitation, (2) the value to the public of imposing the condition manifestly outweighs any impairment of the probationer’s constitutional rights, and (3) there are alternative means that are less damaging to the probationer’s constitutional rights but which would satisfy the purposes of placing the defendant on probation.

2. 730 ILCS 5/5-6-3(a)(8.7), (8.9), and (11) provide that where the defendant is convicted of certain sexual offenses and receives probation, the conditions of probation “shall” include that defendant refrain from communicating with or contacting by means of the Internet any unrelated person whom the defendant reasonably believes to be under 18 years

of age, refrain from accessing or using a social networking website, and refrain from using "scrub" software on any computer. The court noted that these conditions are mandatory and are not unconstitutional in this case although defendant did not use a computer to commit the offense for which a probation term was ordered. Because defendant was sentenced for the sexual abuse of a young girl, the court concluded that probation conditions limiting the use of computers, the Internet, and social networking web sites were reasonably related to the goals of deterrence, protection of the public, and defendant's rehabilitation.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Moore, 2013 IL App (3d) 110474 (No. 3-11-0474, 6/11/13)

Defendant was placed on probation for burglary and ordered to pay restitution to the complainant in the two counts for which he was convicted, and also to a separate complainant named in two counts which were dropped as part of a plea agreement. The State filed a petition to revoke probation and requested that defendant's bond be applied first to restitution. The trial court agreed and checked the box in the sentencing order which stated that bond was to be applied first to restitution. However, the court left the section blank which would have required defendant to pay restitution, and did not check the box indicating that restitution was being ordered.

1. When probation is revoked, an entirely new sentence is imposed. Thus, upon revocation of probation the defendant is no longer subject to the original conditions of probation, including to pay restitution.

Thus, when probation was revoked the original restitution order ceased to exist. Although at the resentencing the trial judge left blank the portion of the sentencing order establishing restitution, it addressed the issue of restitution during the sentencing hearing and responded to the State's request by checking the box in the sentencing order applying defendant's bond first to restitution. The court concluded under these circumstances, the trial judge intended to reestablish a restitution order. Thus, defendant was subject to a restitution order after probation was revoked.

2. However, the provision requiring restitution on the dismissed counts was improper. Generally, a defendant can be required to pay restitution for conduct which did not result in conviction only if the plea agreement includes defendant's agreement to pay such restitution. Because there was no such agreement here, the order requiring restitution concerning the dismissed counts was vacated.

3. The court also concluded that the trial court erred by applying defendant's bond to restitution rather than to paying court costs. 730 ILCS 5/5-5-6(e) provides that the trial court may "require the defendant to apply the balance of his cash bond, ***after payment of court costs, and any fine that may be imposed***[,] to the payment of restitution." Under the plain language of the statute, the trial judge lacks authority to apply defendant's bond to restitution in preference to court costs and fines. Therefore, the portion of the sentencing order applying the bond first to restitution is void because it violates the plain language of the statute.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

People v. Morger, 2016 IL App (4th) 140321 (No. 4-14-0321, 8/3/16)

Defendant was sentenced to 48 months probation with certain probation conditions checked on the form sentencing order, including that the probation was to be served on "Sex Offender Probation under the additional conditions provided by Court Services." Defendant signed an acknowledgment which stated that additional probation conditions could be

imposed.

Four days later, the probation department imposed 24 additional conditions. The Appellate Court held that defendant was improperly sentenced.

The power to impose sentence belongs to the judiciary, and may not be delegated to a third party. Thus, probation conditions must be imposed by the trial judge. Here, the trial judge could have imposed the additional conditions by including them in the probation order, informing defendant of the special conditions, and giving him a copy of the order. However, it was improper to allow the probation department to impose conditions several days after the sentencing hearing.

Because the lower court delegated to the probation department the power to determine probation conditions, resentencing was required.

(Defendant was represented by Assistant Defender Erica Cook-Nichols, Springfield.)

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§40-4(b) Proper

People v. Crabtree, 2015 IL App (5th) 130155 (No. 5-13-0155, 7/30/15)

1. A condition of probation is permissible if there is some connection between the condition and the underlying offense. In evaluating whether a probation condition is constitutional, courts consider whether: (1) the condition reasonably relates to the intended purpose of fostering rehabilitation, (2) the value to the public of imposing the condition manifestly outweighs any impairment of the probationer's constitutional rights, and (3) there are alternative means that are less damaging to the probationer's constitutional rights but which would satisfy the purposes of placing the defendant on probation.

2. 730 ILCS 5/5-6-3(a)(8.7), (8.9), and (11) provide that where the defendant is convicted of certain sexual offenses and receives probation, the conditions of probation “shall” include that defendant refrain from communicating with or contacting by means of the Internet any unrelated person whom the defendant reasonably believes to be under 18 years of age, refrain from accessing or using a social networking website, and refrain from using “scrub” software on any computer. The court noted that these conditions are mandatory and are not unconstitutional in this case although defendant did not use a computer to commit the offense for which a probation term was ordered. Because defendant was sentenced for the sexual abuse of a young girl, the court concluded that probation conditions limiting the use of computers, the Internet, and social networking web sites were reasonably related to the goals of deterrence, protection of the public, and defendant’s rehabilitation.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Goossens, 2014 IL App (3d) 120680 (No. 3-12-0680, 9/30/14)

Under the Unified Code of Corrections, the period of probation for a Class 3 felony shall not exceed 30 months. 730 ILCS 5/5-4.5-40(d). The Code lists several mandatory conditions of probation as well as other conditions that the court may impose at its discretion. Among the discretionary conditions, the court may impose reasonable conditions relating to the nature of offense. 730 ILCS 5/5-6-3(b). The Code also identifies specific conditions that the court may impose, including a requirement that defendant support his dependants. 730 ILCS 5/5-6-3(b)(6).

Defendant was convicted of intimidation, a Class 3 felony, and sentenced to two

years of probation. As a condition of his probation, he was ordered to become current with his child support. Defendant argued that the child-support condition was unauthorized because it: (1) made the probation term indeterminate in violation of the maximum probation period of 30 months; and (2) did not reasonably relate to the offense of intimidation. The Appellate Court rejected both arguments.

First, the court held that the child-support condition did not make the probation term any more indeterminate than fines and fees imposed as part of probation, since a defendant might fail or refuse to pay them during the probation term. Noting that defendant cited no case law in support of his argument, the court declined to find that the child-support condition made his term impermissibly indeterminate.

The court also held that the limitation of being related to the nature of the offense only applied to the general, non-specific conditions of section 5-6-3(b). It did not apply to the specific conditions enumerated in the statute, including the specific condition of child support listed in section 5-6-3(b)(6). Thus the child support condition did not need to be reasonably related to the underlying offense. The court noted its disagreement with **People v. Campbell**, 325 Ill. App. 3d (2001), where the Fourth District held that all of the conditions, both specific and non-specific, in section 5-6-3(b) must be related to the nature of the offense.

The order of probation was affirmed.

(Defendant was represented by Assistant Defender Rikin Shah, Ottawa.)

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§40-4(c) Improper

People v. Moore, 2013 IL App (3d) 110474 (No. 3-11-0474, 6/11/13)

Defendant was placed on probation for burglary and ordered to pay restitution to the complainant in the two counts for which he was convicted, and also to a separate complainant named in two counts which were dropped as part of a plea agreement. The State filed a petition to revoke probation and requested that defendant's bond be applied first to restitution. The trial court agreed and checked the box in the sentencing order which stated that bond was to be applied first to restitution. However, the court left the section blank which would have required defendant to pay restitution, and did not check the box indicating that restitution was being ordered.

1. When probation is revoked, an entirely new sentence is imposed. Thus, upon revocation of probation the defendant is no longer subject to the original conditions of probation, including to pay restitution.

Thus, when probation was revoked the original restitution order ceased to exist. Although at the resentencing the trial judge left blank the portion of the sentencing order establishing restitution, it addressed the issue of restitution during the sentencing hearing and responded to the State's request by checking the box in the sentencing order applying defendant's bond first to restitution. The court concluded under these circumstances, the trial judge intended to reestablish a restitution order. Thus, defendant was subject to a restitution order after probation was revoked.

2. However, the provision requiring restitution on the dismissed counts was improper. Generally, a defendant can be required to pay restitution for conduct which did not result in conviction only if the plea agreement includes defendant's agreement to pay such

restitution. Because there was no such agreement here, the order requiring restitution concerning the dismissed counts was vacated.

3. The court also concluded that the trial court erred by applying defendant's bond to restitution rather than to paying court costs. 730 ILCS 5/5-5-6(e) provides that the trial court may "require the defendant to apply the balance of his cash bond, *after payment of court costs, and any fine that may be imposed*[,] to the payment of restitution." Under the plain language of the statute, the trial judge lacks authority to apply defendant's bond to restitution in preference to court costs and fines. Therefore, the portion of the sentencing order applying the bond first to restitution is void because it violates the plain language of the statute.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

People v. Morger, 2016 IL App (4th) 140321 (No. 4-14-0321, 8/3/16)

Defendant was sentenced to 48 months probation with certain probation conditions checked on the form sentencing order, including that the probation was to be served on "Sex Offender Probation under the additional conditions provided by Court Services." Defendant signed an acknowledgment which stated that additional probation conditions could be imposed.

Four days later, the probation department imposed 24 additional conditions. The Appellate Court held that defendant was improperly sentenced.

The power to impose sentence belongs to the judiciary, and may not be delegated to a third party. Thus, probation conditions must be imposed by the trial judge. Here, the trial judge could have imposed the additional conditions by including them in the probation order, informing defendant of the special conditions, and giving him a copy of the order. However, it was improper to allow the probation department to impose conditions several days after the sentencing hearing.

Because the lower court delegated to the probation department the power to determine probation conditions, resentencing was required.

(Defendant was represented by Assistant Defender Erica Cook-Nichols, Springfield.)

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§40-5

Violation and Revocation of

§40-5(a)

Generally

People v. Hammond & Alberty, 2011 IL 110044 (Nos. 110044 & 110705, 12/1/11)

1. A probation officer has authority to file a petition charging a violation of a condition of probation. Therefore, no separation of powers violation occurred where the probation officer filed a petition informing the trial court and prosecutor of a probation violation and asking the judge to determine whether probation should be revoked and a different sentence imposed. Although the probation officer has discretion to file a petition concerning a probation violation, the court acknowledged that the authority to proceed with or dismiss the petition rests with the State's Attorney, who has the burden to prove the violation in a contested case.

2. Under 730 ILCS 5/5-6-1(i), a probation officer may, with the concurrence of his or her supervisor, offer intermediate sanctions for probation violations. In addition, 730 ILCS 5/5-6-1 requires the Chief Judge of each circuit to adopt a system of structured, intermediate sanctions for probation violations. Once intermediate sanctions are completed, probation may not be revoked for the same violation.

The court concluded that §5-6-1 does not violate the separation of powers doctrine despite the fact that the State's Attorney does not have veto power over the probation officer's decision to offer intermediate sanctions. The court concluded that §5-6-4 adopts a diversionary procedure intended to avoid revocation and the attendant costs to the criminal justice system. Thus, §5-6-4 represents the legislature's definition, as an exercise of its power to define crimes and sentences, of the circumstances in which revocation can be sought. Such action by the legislature does not implicate powers of the executive branch.

The court noted other circumstances in which the State's Attorney's general authority to prosecute crimes has been limited without violating the separation of powers doctrine, including statutes giving discretion to juvenile police officers to handle juvenile offenses through station adjustments and the discretion of police officers to issue warnings in lieu of traffic citations.

3. No separation of powers violation occurred although the local court rules in question here required, as a default, that probation officers offer intermediate sanctions for probation violations unless the failure to do so can be justified to the trial judge. Such rules merely structure the probation officer's exercise of discretion, and do not infringe on any power of the executive branch.

(Defendant Hammond was represented by Assistant Defender Catherine Hart, Springfield.)

(Defendant Alberty was represented by Assistant Defender Rachel Kindstrand, Chicago.)

In re Christopher P., 2012 IL App (4th) 100902 (No. 4-10-0902, 9/12/12)

When no direct appeal is taken from an order of probation, and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of probation unless the underlying judgment of conviction is void.

Respondent appealed from an order denying him sentencing credit upon his commitment to the Department of Juvenile Justice following revocation of probation. Because this order was entered when a new sentence was imposed upon revocation of probation, and the appeal from the resentencing order was timely filed, the Appellate Court had jurisdiction to consider the issue.

(Respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

In re Darius L., 2012 IL App (4th) 120035 (No. 4-12-0035, 9/12/12)

When no direct appeal is taken from an order of probation, and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of probation unless the underlying judgment of conviction is void.

Respondent appealed from an order denying him sentencing credit upon his commitment to the Department of Juvenile Justice following revocation of probation. Because this order was entered when a new sentence was imposed upon revocation of probation, and

the appeal from the resentencing order was timely filed, the Appellate Court had jurisdiction to consider the issue.

(Respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Fischer, 2013 IL App (1st) 110193 (No. 1-11-0193, 12/27/13)

Defendant was sentenced to probation with the condition that he complete a sex-offender treatment program. Shortly before defendant's probation was due to expire, the State filed a petition for violation of probation (VOP), alleging that defendant had not completed his treatment program. At the VOP hearing, the trial court found that defendant had properly complied with the terms of his probation, but through no fault of his own could not complete the treatment program before his probation expired. The court allowed the State to file the VOP and continued the matter for a status hearing to allow defendant time to complete his program. After his initial probationary period had ended, defendant committed violations which led to more VOPs and ultimately the revocation of his probation and a three-year sentence of imprisonment.

Defendant argued on appeal that the trial court violated his right to due process by improperly extending his term of probation without first determining whether he had violated any conditions of his probation. The Appellate Court disagreed, holding that the trial court did not extend defendant's probation, but instead merely tolled his probation during the pendency of the State's petitions for violation of probation. Alternatively, even if the probation had been extended, such action was a proper modification of probation rather than a revocation.

1. Under 730 ILCS 5/5-6-4(a)(1),(3), a VOP which is properly served on the defendant tolls the period of probation until the VOP is resolved. Here the State filed a VOP while defendant's probation was still ongoing. The probation department mailed defendant notice of the VOP and defendant appeared in court on the date scheduled for the VOP hearing. The court allowed the State to file the VOP and continued the matter. The State subsequently filed several supplemental VOPs.

The Appellate Court held that once the State filed its initial VOP, defendant's term of probation was tolled until all the petitions were resolved. Accordingly, the trial court never extended defendant's term of probation prior to finding a violation, and thus there was no violation of his due process rights.

2. The Appellate Court also held that even assuming the trial court effectively extended defendant's probation, such action constituted a modification of probation rather than a revocation. Under 730 ILCS 5/5-6-4(f), the trial court may modify the conditions of probation to deal with changing conditions during the probationary period. As opposed to revocation, which implicates many procedural concerns of due process, a defendant is only entitled to notice and a hearing before his probation is modified. The State has no burden of proving the desirability of the modification.

Here, defendant received notice of the hearing on the VOP and at the hearing he was allowed to present evidence and witnesses and to be represented by counsel. At that hearing, the trial court determined that defendant could not effectively complete his sex-offender treatment program by the end of his term of probation. The trial court thus properly exercised its discretion by modifying the length of defendant's probation to allow him time to complete his treatment program. Such modification, conducted after notice and a hearing, did not violate defendant's due process rights.

(Defendant was represented by former Assistant Defender Patrick Morales-Doyle, Chicago.)

People v. Hammond, Gaither, & Donahue, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2009) (Nos. 4-08-0651, 0652 & 4-09-0214, 12/21/09)

1. 730 ILCS 5/5-6-4(i), which authorizes a probation officer to offer intermediate sanctions for technical probation violations, requires the defendant to immediately accept or reject the sanctions, and precludes the trial court from revoking probation or imposing additional sanctions upon successful completion of the intermediate sanctions, does not violate the separation of powers doctrine by interfering with the State's Attorney's authority to bring a petition to revoke probation. Both the probation officer and the trial court are members of the judicial branch, which has authority to determine whether a petition to revoke probation should be granted or denied or whether probation should be modified.

Thus, §5-6-4(i) contemplates not that the probation officer and the court will exercise the powers of which belong to the State's Attorney, but that they will exercise powers of the judicial branch without regard to the State's Attorney's wishes. "[T]he judicial branch exercised its own power, not the State's Attorney's power. The State's Attorney never had the power to decide what ultimately should be done about a technical violation of probation."

2. The court also rejected the State's argument that the separation of powers doctrine was violated where, after the State's Attorney filed a petition to revoke probation, the trial court ordered the probation office to offer intermediate sanctions. After the defendant accepted and completed the intermediate sanctions, the trial court dismissed the revocation petition.

Because the judicial branch has the power to grant or deny a petition to revoke probation and could have denied the petition to revoke outright, it did not violate the separation of powers doctrine by ordering intermediate sanctions, an outcome that more favorable to the State. The court refused to consider the argument that the trial court erred by failing to follow the statutory procedures set out by §5-6-4(i), which authorizes intermediate sanctions before a petition to revoke probation had been filed, because the State failed to raise the issue in the trial court.

3. The court also declined to consider the State's argument that §5-6-4(i) violates the separation of powers doctrine by forcing circuit courts to delegate judicial discretion to probation officers in cases of technical violation of the conditions of probation, and therefore unduly infringes on the judicial branch in determining an appropriate sentence. The State first raised this issue in the middle portion of the "Argument" section of its brief; "we do not want to run the risk that defendants would be confused or blind-sided by a new theory that the State slipped into the body of its argument."

(Defendants were represented by Assistant Defender Catherine Hart, Springfield.)

People v. Keller, 399 Ill.App.3d 654, 926 N.E.2d 890 (1st Dist. 2010)

Noting a conflict in authority, the court concluded that a probation officer has authority to file a petition charging a probation violation. Compare, **People v. Herrin**, 385 Ill.App.3d 187, 895 N.E.2d 1075 (3d Dist. 2008).

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

People v. Konwent, 405 Ill.App.3d 794, 939 N.E.2d 1018 (2d Dist. 2010)

730 ILCS 5/5-6-4(d) provides that probation, conditional discharge, periodic imprisonment and supervision may not be revoked for failure to comply with a financial obligation unless the failure is due to a willful refusal to pay. However, the failure to comply with a non-financial condition may result in revocation even if the violation was not willful. "Probation is a privilege that may be revoked when the defendant's acts, culpable or otherwise,

require revocation to serve ‘the ends of justice.’”

Thus, the trial court was not required to find that defendant wilfully failed to return on time from work release in order to find that a probation violation had occurred. The court noted, however, that while the lack of culpability was not a factor in determining whether a probation violation had been proven, it was relevant to the trial court’s decision whether to revoke probation and in imposing a new sentence.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Moore, 2013 IL App (3d) 110474 (No. 3-11-0474, 6/11/13)

Defendant was placed on probation for burglary and ordered to pay restitution to the complainant in the two counts for which he was convicted, and also to a separate complainant named in two counts which were dropped as part of a plea agreement. The State filed a petition to revoke probation and requested that defendant’s bond be applied first to restitution. The trial court agreed and checked the box in the sentencing order which stated that bond was to be applied first to restitution. However, the court left the section blank which would have required defendant to pay restitution, and did not check the box indicating that restitution was being ordered.

1. When probation is revoked, an entirely new sentence is imposed. Thus, upon revocation of probation the defendant is no longer subject to the original conditions of probation, including to pay restitution.

Thus, when probation was revoked the original restitution order ceased to exist. Although at the resentencing the trial judge left blank the portion of the sentencing order establishing restitution, it addressed the issue of restitution during the sentencing hearing and responded to the State’s request by checking the box in the sentencing order applying defendant’s bond first to restitution. The court concluded under these circumstances, the trial judge intended to reestablish a restitution order. Thus, defendant was subject to a restitution order after probation was revoked.

2. However, the provision requiring restitution on the dismissed counts was improper. Generally, a defendant can be required to pay restitution for conduct which did not result in conviction only if the plea agreement includes defendant’s agreement to pay such restitution. Because there was no such agreement here, the order requiring restitution concerning the dismissed counts was vacated.

3. The court also concluded that the trial court erred by applying defendant’s bond to restitution rather than to paying court costs. 730 ILCS 5/5-5-6(e) provides that the trial court may “require the defendant to apply the balance of his cash bond, ***after payment of court costs, and any fine that may be imposed***[,] to the payment of restitution.” Under the plain language of the statute, the trial judge lacks authority to apply defendant’s bond to restitution in preference to court costs and fines. Therefore, the portion of the sentencing order applying the bond first to restitution is void because it violates the plain language of the statute.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

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§40-5(b)

Sufficiency of Proof

People v. Konwent, 405 Ill.App.3d 794, 939 N.E.2d 1018 (2d Dist. 2010)

730 ILCS 5/5-6-4(d) provides that probation, conditional discharge, periodic imprisonment and supervision may not be revoked for failure to comply with a financial obligation unless the failure is due to a willful refusal to pay. However, the failure to comply with a non-financial condition may result in revocation even if the violation was not wilful. “Probation is a privilege that may be revoked when the defendant’s acts, culpable or otherwise, require revocation to serve ‘the ends of justice.’”

Thus, the trial court was not required to find that defendant wilfully failed to return on time from work release in order to find that a probation violation had occurred. The court noted, however, that while the lack of culpability was not a factor in determining whether a probation violation had been proven, it was relevant to the trial court’s decision whether to revoke probation and in imposing a new sentence.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

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§40-5(c)

Stipulation to or Admission of Violation

People v. Saleh, 2013 IL App (1st) 121195 (No. 1-12-1195, 8/14/13)

1. An order of supervision is not a final judgment of conviction. If a defendant successfully completes supervision, the charges are dismissed and the result resembles an acquittal. If supervision is not completed successfully, defendant may be found guilty and sentenced. There is a final judgment of conviction only upon revocation of supervision.

2. Supreme Court Rule 402A provides that in proceedings to revoke supervision in which the defendant admits to the violation or offers to stipulate that the evidence is sufficient to revoke supervision, the trial court must admonish defendant and determine that he understands: (1) the specific allegations in the petition to revoke supervision; (2) his right to a hearing with counsel present, including appointed counsel if he is indigent and the underlying offense is punishable by imprisonment; (3) the right to confront and cross-examine adverse witnesses and present witnesses and evidence on his behalf at the hearing; (4) the State must prove the alleged violation by a preponderance of the evidence; (5) on admitting a violation or stipulating that the evidence is sufficient to revoke, there will be no hearing, and defendant has waived his right to a hearing, to confront and cross-examine adverse witnesses, and to present witnesses and evidence on his behalf; (6) the sentencing range for the underlying offense. The court must also determine that the admission is voluntary, not based on any coercion or promise, and that there is a factual basis for the plea.

The court must substantially comply with Rule 402A by an affirmative showing in the record that the defendant understood each of the required admonitions. A court’s compliance with the rule is reviewed *de novo*.

The court did not substantially comply with Rule 402A when it accepted defendant’s stipulation that the evidence was sufficient to revoke his supervision. The court did not determine that defendant understood the allegations of the petition by its inquiry whether defendant had discussed the reasons for the violation with his attorney and understood the allegations. The court did not inform defendant of his right to a hearing at which he could confront adverse witnesses and present his own evidence, and at which the State had the burden of proof. He was not told that he was waiving these rights by stipulating. The court did not confirm that the stipulation was voluntary or that there was a factual basis. Although the

court did inform defendant of the sentencing range for the offense when he was placed on supervision, that was almost two years prior to the revocation proceeding.

The court remanded with directions that the defendant be allowed to withdraw his stipulation and for further proceedings.

(Defendant was represented by Assistant Defender Philip Payne, Chicago.)

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§40-5(d)

Contempt of Court

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§40-6

Sentencing after Revocation

People v. Varghese, 391 Ill.App.3d 866, 909 N.E.2d 939 (2d Dist. 2009)

1. When imposing a sentence upon revocation of probation, the trial court may properly consider the defendant's conduct while on probation as evidence of rehabilitative potential. However, the court may not punish the defendant for the conduct which gave rise to the probation violation. If such conduct constitutes a separate offense, the defendant should be charged and tried for that offense instead of having his sentence increased after revocation of probation for a different offense.

In determining whether the trial court improperly punished the defendant for conduct while on probation, reviewing courts consider whether the sentence was within the authorized statutory range, whether the sentence was consistent with that of other defendants with similar criminal backgrounds, and whether the record clearly shows that the trial court considered the original offense.

2. Where defendant was sentenced to two years probation for aggravated criminal sexual abuse, but upon revocation of probation was sentenced to seven years imprisonment, the record showed that the sentence was based on the conduct which resulted in revocation rather than on the original offense. The trial court did not focus on the original offense, but instead concentrated on the conduct which was the basis of the revocation petition – that defendant used the Internet to arrange a meeting with a 16-year-old girl. Because the trial court improperly commingled charged and uncharged conduct rather than focusing on the original offense, the sentence was vacated and the cause remanded for resentencing.

(Defendant was represented by Assistant Defender Erin Sexton, Chicago.)

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